IN THE

Supreme Court of the United States

October Term, 1958
No. 1003

PAUL GINSBURG,
Petitioner

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly, as Justices of the Supreme Court of Pennsylvania

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is unreported. The opinion of the United States Court of Appeals for the Third Circuit is reported at 263 F. 2d 457.

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on February 17, 1959. Rehearing was denied on March 16, 1959.

QUESTIONS PRESENTED

1. Does a United States District Court have power to vacate its order dismissing a complaint after such order has been affirmed on appeal to the United States Court of Appeals for the proper circuit and the mandate of the Court of Appeals has been issued to the District Court where the party seeking vacation of such order asserts no new ground for relief?

2. Assuming a District Court has the power to vacate its order dismissing a complaint after the order has been affirmed on appeal and the mandate of the Court of Appeals has been issued, would such action be justified where the only reason asserted in support of such action is that the Court of Appeals affirmed the original order of dismissal for a reason in law different from that of the District Court?

STATEMENT OF THE CASE

This brief in opposition is limited to the application for a petition for a writ of certiorari seeking review of the judgment of the Court of Appeals at No. 12764. Defendants-respondents in that proceeding are, as set forth on the cover of the present petition, the seven judges of the Supreme Court of Pennsylvania at the time the complaint was filed. Their counsel has been and is the Attorney General of Pennsylvania. The facts and history of the case are as set forth below. None of these matters are the same as those pertaining to the judgment of the Court of Appeals at No. 12765, a judgment of which petitioner is also seeking review in the present petition.

On February 2, 1956, petitioner filed his complaint in the United States District Court for the Western District of Pennsylvania. He alleged therein that respondents, the then seven judges of the Supreme Court of Pennsylvania, in the course of their official duties had deprived him of rights guaranteed him by the Constitution and statutes of the United States. Respondents and petitioner filed several motions, including a Motion To Dismiss by respondents. Following argument thereon, the District Court, on December 18, 1956, granted respondents' Motion To Dismiss on the ground that judges acting in their official capacity were immune from suit. 148 F. Supp. 663.

Petitioner appealed from this order to the United States Court of Appeals for the Third Circuit. His

initial Motion To Remand was denied on April 17, 1957; and the order of the District Court was affirmed, after argument on the appeal, on January 3, 1958. The Court of Appeals affirmed because, as it stated, petitioner's complaint "does not show that he has been denied any rights, privileges or immunities secured by the Constitution and the laws of the United States." 251 F. 2d 49, 50. It thus deemed unnecessary a determination of the judicial immunity question on which the District Court based its decision.

Petition for Rehearing was denied on February 4, 1958. These appeal proceedings are found at No. 12165 in the Court of Appeals.

Petitioner then filed a Petition for a Writ of Certiorari with this Court. The Petition was denied on April 14, 1958, 356 U.S. 932; and the mandate of the Court of Appeals was issued to the District Court on April 21, 1958. A timely Petition for Rehearing was denied on May 5, 1958, 356 U.S. 954. Petitioner's Motion To Remand was denied on June 23, 1958. 357 U.S. 924. These proceedings were docketed at No. 834 October Term, 1957.

On the same date, June 23, 1958, petitioner filed with the District Court a Motion To Vacate Order Dismissing Complaint and for Other Relief. His reason in support of this Motion was that the Court of Appeals, in affirming the dismissal for a reason different from that announced by the District Court, had acted beyond its powers and that this Court's denial of his petition for a writ of certiorari under the circumstances affirmed this lack of power. Petitioner's Motion was denied without opinion, in an unreported order, on September 16, 1958. Civil Action No. 14240.

Petitioner then appealed from this denial of his Motion to the Court of Appeals which affirmed *per curiam* on February 17, 1959. A Petition for Rehearing was denied on March 16, 1959.

ARGUMENT

The decision of the Court of Appeals was clearly correct and raises no conflict with any decision by any other Court of Appeals or by this Court. The sole issue presented to the Court of Appeals was the correctness of the District Court's denial of Petitioner's Motion To Vacate its order dismissing his complaint. The Court of Appeals properly relied on its earlier decision in *Butcher & Sherrerd v. Welsh*, 206 F. 2d 259, in which it stated:

> "Where a judgment has been affirmed on appeal and the mandate handed down it is beyond the power of the lower court to disturb the judgment without leave of the appellate court."
> 206 F. 2d 259, 262.

The Court of Appeals in that opinion also pointed out that Rule 60(b) of the Federal Rules of Civil Procedure does not confer upon a District Court the power to alter or amend a judgment which has been affirmed on appeal.

In a later case, *Ginsburg v. Stern*, 242 F. 2d 379, the Court of Appeals indicated that its ruling in *Butcher & Sherrerd* might not apply to a case where the relief requested of the District Court is based on new grounds which were not and "perhaps could not" have been presented to the appellate court at the time of a previous appeal. 242 F. 2d 379, 381. A similar indication appears from the opinion of the Court of Appeals for the 2nd Circuit in *In the Matter of Long Island*

Lighting Company, 244 F. 2d 499; cert. denied, 355 U.S. 820.

Petitioner in the present case, however, has presented no new grounds for relief. Somehow, he has concluded that because the Court of Appeals affirmed the original order dismissing the complaint on a legal basis different from that of the District Court (i.e. on the ground that the complaint failed to show a deprivation of any federally-protected rights, privileges or immunities rather than on the ground that judges are immune from liability for their official acts), the Court of Appeals acted improperly. In fact, he goes so far as to state in the present petition (p. 20) that the Court of Appeals thus "reversed" the District Court on the immunity issue, despite the former court's express disclaimer that it in any way was passing on the immunity question. 251 F. 2d 49, 50.

Petitioner completely overlooks the elementary doctrine that an appellate court may affirm a decision on the record presented to it (here, a complaint and motion to dismiss) without agreeing with the lower court's reasoning. No more than that appears in this case.

The many questions sought to be raised by petitioner here are no different in substance from those he sought to raise in his previous petition at No. 834 October Term, 1957. None of them are now properly raised since they were properly before neither the District Court nor the Court of Appeals. The question of the sufficiency of the complaint has been adjudicated finally and not reopened. The interesting question of judicial immunity is not involved. All

that is properly before this Court are the questions stated at the outset of this brief, and these have been decided correctly by the Court of Appeals.

CONCLUSION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

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